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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DYNAMIC GENOME, LLC,

Plaintiff and Respondent,

v.

NILESH DHARAJIYA,

Defendant and Appellant.

D073604

(Super. Ct. No. 37-2015-00040775-  
CU-BC-CTL)

APPEALS from a judgment and an order of the Superior Court of San Diego  
County, Judith F. Hayes, Judge. Affirmed.

Hickman & Robinson and Kyle E. Yaege, for Defendant and Appellant.

Dillon Gerardi Hershberger Miller & Ahuja, Timothy P. Dillon and Sunjina K.  
Ahuja, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Niles Dharajiya appeals from a judgment in favor of  
plaintiff and respondent Dynamic Genome, LLC (Dynamic or sometimes company), a

Delaware limited liability company. Dharajiya also appeals from the order granting attorney fees to Dynamic. We affirm the judgment and order.

### FACTS AND PROCEDURAL BACKGROUND<sup>1</sup>

Dharajiya and brothers Manal Mehta and Ritvik Mehta<sup>2</sup> formed Dynamic in May 2014. Its purpose was to start and operate a genomics laboratory in India. Dharajiya, Manal, and Ritvik (collectively members) were the sole members and each owned one-third of the company. The members agreed to participate equally in all profits and losses of the company. They prepared an operating agreement spelling out the terms of operation. They appointed Manal as the chief executive officer (CEO), Ritvik as the chief operating officer (COO), and Dharajiya as the chief science officer (CSO).

Dynamic leased and built out laboratory space in India, hired employees in India, and purchased the necessary equipment for the operation. Each member, including Dharajiya, agreed that the startup and construction costs were to be paid by a line of credit, and that each was responsible for one-third of Dynamic's expenses. The Mehtas advanced funds for the company's expenses before the line of credit was approved. When the line of credit was eventually obtained, the funds were deposited into Dynamic's account. Dynamic reimbursed the Mehtas for the construction and startup expenses they had advanced.

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<sup>1</sup> These facts were found by the court in its Statement of Decision. The reporter's transcript of the trial was not included in the record on appeal.

<sup>2</sup> Manal Mehta and Ritvik Mehta are referred to collectively as "the Mehtas," or by their first names when applicable, to distinguish them. No disrespect is intended.

In February 2015, the members agreed to close the company. There were "many heated exchanges between the three partners regarding payment of company expenses." Dharajiya agreed that he was responsible for one-third of the expenses of the company but failed to reimburse Dynamic for those expenses. Dynamic filed this action against Dharajiya for breach of contract, seeking recoupment of Dharajiya's share of expenses.<sup>3</sup>

The trial court held a three-day bench trial. It found that the reasonable business expenses of the company during its operation totaled \$183,268.18. The trial court determined that Dharajiya's one-third share, after accounting for the amounts he had contributed to the company, was \$32,176.27. The court entered judgment on behalf of Dynamic.

Dharajiya has appealed the judgment. He presents three arguments contending that Dynamic was not capable of filing this action: 1) the unanimous consent of all members was required to file this lawsuit; 2) Dynamic failed to register as a foreign limited liability company with the California Secretary of State; and 3) the operating agreement mandated resolution of this dispute by arbitration. He has not challenged the finding that he is responsible for one-third of the expenses or the amount of his share.

After the trial, the court awarded \$76,532.10 in attorney fees to the prevailing party, Dynamic, pursuant to Article 12.10 of the operating agreement. Dharajiya has also appealed the postjudgment order for attorney fees.

## DISCUSSION

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<sup>3</sup> There was also a cause of action for conversion related to the genome-sequencing equipment but that has been resolved.

## 1. *Standard of Review*

We review the factual findings of the trial court for substantial evidence in support of the judgment, viewing the evidence in the light most favorable to the ruling and resolving all conflicts in favor of the court's findings. (*SFPP v. Burlington Northern & Santa Fe Railway Co.* (2004) 121 Cal.App.4th 452, 462 (*SFPP*).) We affirm the judgment when substantial evidence supports the factual finding of the trial court. (*Ibid.*) This standard of review applies to implied findings that were necessary to the trial court's judgment as well as its express findings. (*Ibid.*) If the evidence is conflicting or different inferences could reasonably be drawn, the trier of fact has the duty to resolve those conflicts and choose the inferences to be drawn. We accept the inferences drawn by the trier of fact if such inferences can be supported in any reasonable fashion. We do not substitute the inferences we may prefer for inferences reasonably drawn by the trier of fact. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.) "[O]ur review begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings below." (*Williamson v. Brooks* (2017) 7 Cal.App.5th 1294, 1299 (*Williamson*); *SFPP*, at p. 462.)

We interpret the operating agreement to give effect to the parties' mutual intent at the time of contracting, interpreting the parties' intention from the writing alone if possible. (Civ. Code, §§ 1636, 1639; *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 (*Founding Members*).) " 'The words of a contract are to be understood in their ordinary and popular sense.' " (*Founding Members*, at p. 955, quoting Civ. Code, § 1644.)

Statutes, similarly, are interpreted according to the plain and commonsense meaning of the words used. " ' "When the language of a statute is clear, we need go no further." ' " (*People v. Harrison* (2013) 57 Cal.4th 1211, 1221.) The statutes cited herein are clear and require no extraneous evidence for interpretation.

2. *Unanimous Consent of All Members Was Not Necessary to Act on Behalf of Dynamic*

Dharajiya contends that Dynamic could not maintain this action because the operating agreement required unanimous consent to file this suit. The trial court did not address this issue in its tentative statement of decision, and Dharajiya did not request a decision on this issue in his request for corrections to the statement of decision.

Because Dharajiya never notified the trial court that it had failed to address this issue, we must infer that the trial court made all factual findings in favor of the prevailing party and in support of the judgment. (*In Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58–60.)

Dharajiya has not borne his burden of showing that the trial court erred.

The operating agreement provided that Dynamic would be governed by its members, acting through the managers they appointed. Dharajiya relies on Section 2.5 of the operating agreement, which described the voting rights of the members. It provided that the members would act unanimously in overseeing the business but did not provide the exclusive means for the Company to transact business. Article IV of the operating agreement set forth the company's "Manner of Acting" in Section 4.1 permitting the members to appoint officers and agents to conduct the business of the company. The trial court made a finding of fact that the members authorized Manal and Ritvak as officers to

conduct the business of the company. Dharajiya was an officer as well, but nothing required the unanimous consent of all officers to conduct Dynamic's business. (See *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 965 [LLC that suffers a loss caused by one of its members must file suit against the member to recover losses].) Dharajiya has not rebutted the trial court's implied finding that Dynamic acted through its officers to file this lawsuit on behalf of the company.

### 3. *Dynamic Was Not Required to Register in California*

Dharajiya contends that Dynamic could not file this lawsuit because it had not registered with the California Secretary of State. The trial court rejected the argument, finding that Dynamic conducted its business in India, not in California.

A foreign limited liability company that transacts intrastate business in California may not maintain an action in California unless it has a certificate of registration to transact intrastate business here. (Corp. Code, § 17708.07, subd. (a).) A foreign limited liability company is considered to be transacting intrastate business if it enters into repeated and successive transactions within California. (Corp. Code, § 17708.03, subd. (a).) Transacting business in interstate commerce does not constitute conducting intrastate business. (*Id.* at § 17708.03, subd. (b)(10).) An entity may conduct interstate business without transacting intrastate business. (*Carl F.W. Borgward, G.M.B.H. v. Superior Court* (1958) 51 Cal.2d 72, 76.)

The trial court made a factual finding that Dynamic's business was conducted in India and Dynamic did not carry on repeated and successive transactions of business in California. The trial exhibits show that Dynamic carried on its business in India. The

purpose of the company was to establish a genomics laboratory in India, enter the testing market in India, and "establish other verticals for Genomics Testing in India." A power point presentation explained prenatal testing in India. Employment agreements and a lease were for work in India. Even if Dynamic carried on its business through a subsidiary, that was its mode of conducting business and did not negate Dynamic's conducting of its business in India.

A nonexclusive and extensive list of activities that do not constitute transacting intrastate business is set forth in Corporations Code section 17708.03, subdivision (b). Several factors cited by Dharajiya in support of his claim that Dynamic conducted intrastate business are specifically excluded by subdivision (b) of section 17708.03.<sup>4</sup> The

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<sup>4</sup> Corporations Code section 17708.03, subdivision (b), provides:

"(b) Without excluding other activities that may not be considered to be transacting intrastate business in this state within the meaning of this article, activities of a foreign limited liability company that do not constitute transacting intrastate business in this state include all of the following:

"(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement of those, or the settlement of claims or disputes.

"(2) Carrying on any activity concerning its internal affairs, including holding meetings of its members or managers.

"(3) Maintaining accounts in financial institutions.

"(4) Maintaining offices or agencies for the transfer, exchange, and registration of the limited liability company's own securities or maintaining trustees or depositories with respect to those securities.

"(5) Selling through independent contractors.

"(6) Soliciting or procuring orders, whether by mail or electronic means or through employees or agents or otherwise, if the orders require acceptance outside this state before they become contracts.

"(7) Creating or acquiring indebtedness, evidences of indebtedness, mortgages, liens, or security interests in real or personal property.

excluded activities include: establishment of a bank account (*id.* at subd. (b)(3)); obtaining loans and soliciting financing (*id.* at subd. (b)(7)); the residence of the members and the signing of operating documents in California (*id.* at subd. (b)(2)); choice of California as forum for resolving disputes (*id.* at subd. (b)(1)); purchase of equipment from an out-of-state company (*id.* at subd. (b)(10)); and conduct of internal affairs (*id.* at subd. (b)(2)). Other factors cited by Dharajiya are not sufficient to show repeated and successive business transactions in California, and do not outweigh the substantial evidence in the record that Dynamic conducted its business in India.

The trial court properly found that Dynamic did not need to register in California because its business was carried on in India. (*Williamson, supra*, 7 Cal.App.5th at p. 1299; *SFPP, supra*, 121 Cal.App.4th at p. 462.)

#### 4. *Dharajiya Waived Arbitration*

Dharajiya contends that this case should have been dismissed because the operating agreement compelled the parties to mediate and arbitrate this dispute. The trial court found this contention lacked merit because Dharajiya waived any right he may have had to compel arbitration. The record supports the trial court's finding.

##### a. Background

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"(8) Securing or collecting debts or enforcing mortgages or other security interests in property securing the debts and holding, protecting, or maintaining property so acquired.

"(9) Conducting an isolated transaction that is completed within 180 days and is not in the course of a number of repeated transactions of a like nature.

"(10) Transacting business in interstate commerce."



Article XI of the operating agreement sets forth provisions for dispute resolution among members, starting with good faith negotiation, then mediation, and arbitration if mediation fails. Section 11.1, Disputes Among members, states that the members will use these procedures "in the event of any dispute or disagreement solely between or among any of them arising out of, relating to or in connection with this Agreement or the Company or its organization, formation, business or management." The plain language does not include disputes between Dynamic and a member. The operating agreement spelled out when it meant to include actions between and among the company and a member, as in Section 12.10, Attorneys' Fees, *post*.

In any event, Dynamic filed its complaint in December 2015 and Dharajiya answered. The Code of Civil Procedure permitted him to file a petition to enforce the dispute resolution clause instead of an answer, but Dharajiya chose not to do so. (See Code Civ. Proc., § 1281.7.) He never moved to compel arbitration or to stay the proceedings to pursue alternate dispute resolution. Instead, Dharajiya filed a motion for summary judgment asking the court to dismiss the complaint, not to compel arbitration. The trial court denied the motion for summary judgment. The parties then conducted written discovery and depositions and proceeded to trial. A bench trial was held from May 16 through May 18, 2017.

b. Applicable Law

Public policy favors arbitration because it provides a speedy and relatively inexpensive means of dispute resolution. The policy is "intended ' 'to encourage persons

who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing." ' ' " (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1204 (*St. Agnes*).) A party can waive arbitration. (*Id.* at p. 1195; Code Civ. Proc., § 1281.2.<sup>5</sup>) "Whether a party has waived the right to compel arbitration is generally a question of fact. A trial court's finding of waiver is therefore reviewed under the substantial evidence standard. [Citation.]" (*Sprunk v. Prisma* (2017) 14 Cal.App.5th 785, 794 (*Sprunk*).) Waiver of arbitration can be express or implied from the parties' conduct. (*Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389.) We " 'may not reverse the trial court's finding of waiver unless the record as a matter of law compels finding nonwaiver.' [Citation.]" (*Burton v. Cruise* (2010) 190 Cal.App.4th 939, 946.)

The Supreme Court has identified various factors that are relevant and properly considered in assessing waiver claims, including whether the party's actions were inconsistent with the right to arbitrate, whether it participated in discovery and other litigation, and whether the opposing party was harmed or prejudiced by a party's failure to promptly request arbitration. (*Sprunk, supra*, 14 Cal.App.5th at p. 796; *St. Agnes, supra*, 31 Cal.4th at p. 1195.)

c. Analysis

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<sup>5</sup> Code of Civil Procedure section 1281.2 provides that, upon petition by a party to an arbitration agreement, a court shall order arbitration "if it determines that an agreement to arbitrate the controversy exists," unless it determines that "(a) [t]he right to compel arbitration has been waived by the petitioner."

Dharajiya's actions were inconsistent with the right to arbitrate because he never petitioned the court to compel arbitration and never sought a stay of the proceedings. Instead, he filed a motion for summary judgment on the ground that Dynamic had filed suit instead of arbitrating the claim, as in *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1089.) The trial court denied the motion for summary judgment. Dharajiya then went forward with discovery and litigation, prejudicing Dynamic by requiring it to expend a substantial amount of money, time and resources in preparing for and trying the case. Dharajiya waived any claim for arbitration by this further litigation. (*Sprunk, supra*, 14 Cal.App.5th at p. 796; *St. Agnes, supra*, 31 Cal.4th at p. 1195.)

#### 5. Attorney Fees

The trial court awarded attorney fees to Dynamic pursuant to Section 12.10 of the operating agreement. That section provides:

**"12.10 Attorneys' Fees.** In any dispute between or among the Company and one or more of the Members, including, but not limited to, any Member Dispute, the prevailing party or parties in such dispute shall be entitled to recover from the non-prevailing party or parties all reasonable fees, costs and expenses, including, without limitation, attorneys' fees, costs and expenses, . . . ."

The trial court found that Dynamic was the prevailing party. There was no error. When a written contract expressly provides for an award of attorney fees, the prevailing party is entitled to recover its fees, whether incurred at trial or on appeal. (Civ. Code, § 1717; *Starpont Properties, LLC v. Namvar* (2011) 201 Cal.App.4th 1101, 1111.) The trial court did not err in awarding attorney fees to Dynamic.

Moreover, Dynamic has prevailed here and is entitled to recover its fees on appeal. Dynamic should serve and file a notice of motion for its appellate attorney fees in the trial court within the time for serving and filing the memorandum of costs. (Cal. Rules of Court, rule 3.1702(c); *City of Crescent City v. Reddy* (2017) 9 Cal.App.5th 458, 468.)

#### DISPOSITION

The judgment and order after trial are both affirmed. Respondent Dynamic is awarded its attorney fees and costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

IRION, J.

DATO, J.